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UK Constitutional Law Association

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Stephen Tierney: The Scotland Bill before the Scottish Parliament



The Scotland Bill, which intends to implement the Calman Committee report, is currently before the Scottish Parliament for consideration under the Sewel convention. It is being assessed by a specially convened Committee of the Parliament which is considering whether or not Holyrood should give another Legislative Consent Motion.

The Bill completed its Committee stage in the House of Commons on 15 March 2011 and its Report and third reading stages by 21 June. The engagement of the Scottish Parliament comes before the House of Lords addresses the Bill. In the Lords it will be possible to table further amendments, some of which may well result from the current Scottish parliamentary process.

The convention issue is an interesting one. The Sewel Convention of course that requires that any change to the devolved powers of the Scottish Parliament or the Scottish Government should ordinarily pass through Westminster only once the consent of the Scottish Parliament has been obtained. The first thing to note is that the Scottish Parliament's Scotland Bill Committee is now in its second incarnation. The Bill was published on 30 November 2010 by the coalition Government. The Committee was first established on 7 December 2010 and considered the Bill during the term of the last Scottish Parliament when it was chaired by Labour's Wendy Alexander. This committee reported in March 2011 and based on this report the Scottish Parliament then agreed to pass a 'Legislative Consent Motion', 'supporting the general principles' of the Bill but inviting the UK Government and the UK Parliament to consider amendments and proposals contained in the report of the Scotland Bill Committee. It also asked to see any amendments made to the Bill with a view to debating them in a further legislative consent motion before the Bill was passed for Royal Assent. This was interesting because it introduced the idea of a *qualified* LCM.

Following the May 2011 Scottish parliamentary election and the return of an overall SNP majority the committee was reconstituted with a very different composition and the new Committee is reconsidering the whole issue of whether or not to give another LCM. In his speech to the Scottish Parliament on 18 May 2011, the First Minister, Alex Salmond MSP, called for 'improvements' to the Bill. He specifically outlined six areas for further improvement: borrowing powers, corporation tax, the Crown Estate, excise duties, digital broadcasting and a stronger say in European policy. On 13 June 2011, the UK Government announced proposals to amend the Scotland Bill, and it is with a complex mix of the published Bill, plus additional provisions proposed both from Whitehall and the Scottish Government that the Committee is concerned.

The Committee is coming to the end of its deliberations and intends to report in December 2011. The

main focus of public interest in the Bill is on tax and borrowing powers, but there are also a number of constitutional matters that lawyers might want to look out for.

Highlights include:

Clause 15 which will rename the Scottish Executive as the Scottish Government. This has become the commonly used term and the provision will formalise this change. The 'Scottish Government' was a title adopted by the Scottish Labour. The Bill accepts that the new usage has become so established that it needs to be recognised in law.

Clauses 4 and 5 will enable the Scottish Parliament to decide respectively on the number of deputy presiding officers and how to constitute the Scottish Parliament Corporate Body. These are intended to make the workings of the Parliament run more smoothly; as such they are uncontroversial.

Clause 6 proposes to amend Section 31(1) of the Scotland Act to extend the duty to anyone introducing a bill within the Scottish Parliament to certify that the bill is within competence. This duty presently only applies to ministers. In other words, a statement roughly equivalent to a s19 statement under the Human Rights Act will now be required even of backbench MSPs introducing a Bill into Holyrood.

Clause 7 aims to provide the Secretary of State for Scotland with the power to refer only particular provisions within bills rather than the entire Bill (as present under section 33 of the Scotland Act 1998) to the Supreme Court prior to Royal Assent. This would allow the other provisions in the Bill to come into force.

Clause 10 will amend section 30 of the Scotland Act to allow changes to the catalogue of reserved matters in Schedules 4 and 5 by Order in Council as necessary or appropriate. In effect this will allow these powers to be changed temporarily. At the moment extensions of powers cannot be limited in time. This issue arose from the *Somerville case* which led to a speedy amendment of the Scotland Act to see off some of the possible consequences of that case.

Clause 16 again builds upon *Somerville* and the Convention Rights Proceedings (Amendment) (Scotland) Act 2009 passed subsequent to this. The idea is that there should be consistency between the time bar period for devolution issues under the Scotland Act and the time bar period under the Human Rights Act 1998.

Clause 23 proposes to extend further powers to UK Ministers to implement international obligations. It provides that a regulation made by UK Ministers, implementing an international obligation, can have effect throughout the UK, irrespective of whether or not it deals with matters which are within devolved competence.

Clause 17 is a recently introduced measure which will do two things. First it will amend section 57(3) of the 1998 Act so that acts or failures to act of the Lord Advocate in prosecuting any offence, or as head of the system of criminal prosecutions in Scotland, are not rendered *ultra vires* by virtue of section 57(2) of the 1998 Act. This is in line with the recommendations of various reviews of how the existing law has led to countless legal challenges against the Lord Advocate for any defects in the criminal justice system.

Second, Clause 17 addresses the important and controversial issue of appeals to the Supreme Court from the High Court of Justiciary, Scotland's highest criminal court. Traditionally there has been no right of appeal in Scots criminal matters to the Judicial Committee of the House of Lords or the Supreme Court. The Scotland Act complicates this of course since 'devolution issues' arising even in criminal cases are able to go to the Supreme Court, as they were the JCPC. The Bill proposes to introduce a fairly wide ranging right of appeal. The Lord Advocate has responded on behalf of the

Scottish Government with a more limited right of appeal based upon the [McCluskey report](#) which considered this matter; this seeks to confine appeals to constitutional issues and would require the ‘certification’ of the High Court of Justiciary that the matter is of ‘general public importance’.

We await to see if a compromise on this and other matters can be reached which will lead to the Committee, or at least a majority of its members, recommending that the Parliament pass a Legislative Consent Motion – even of a qualified nature.

Stephen Tierney is Professor of Constitutional Theory at the University of Edinburgh and constitutional adviser to the Scottish Parliament Committee on the Scotland Bill.

One comment on “Stephen Tierney: The Scotland Bill before the Scottish Parliament”

[barry winetrobe](#)

November 24, 2011



This demonstrates the need for more institutionalised inter-parliamentary relations (IPR) machinery under devolution, at least matching IGR arrangements between the 4 governments.

This is wider than just Sewel. The Jan 2003 HL Constitution Committee Report on devolution had a chapter arguing for better IPR (I wrote a paper on IPR for it: 2nd Rpt 2002-03, HL 28, appx 5 Paper 1). I also argued unsuccessfully within the new Scottish Parliament in 1999-2000 for the need to fill the glaring gap in its scrutiny committee arrangements to cover core constitutional and governmental issues, such as the devolution ‘settlement’ itself.

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